APPEAL NO. 010087

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 30, 2000. The hearing officer determined that the respondent (claimant) was entitled to his seventh quarter of supplemental income benefits (SIBs); as part of this determination, she held that "the totality" of the claimant's treating doctor's records showed an inability to work during the qualifying period.

The appellant (carrier) appealed and said that there was no medical report which satisfied the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)). There is no response from the claimant.

DECISION

Reversed and a new decision rendered that the claimant did not prove that he made a good faith search for employment commensurate with his ability to work and is therefore not entitled to SIBs for the seventh quarter.

The claimant injured his neck on _____, when a 15-pound object fell on him. He said he had been paid the previous six quarters of SIBs. He said that it was his understanding that his work status had not changed throughout this period. The claimant had lumbar surgery on January 13, 1999.

The qualifying period ran from May 19 through August 17, 2000. The claimant sought no employment during this time. There are numerous medical records in evidence well before this period (back to 1995), many of marginal relevance to the issue of ability to work during the qualifying period. While there are numerous records in evidence which discuss repeated testing for the claimant, the fact that he had decided to have cervical surgery, and that this was recommended in late 1999, the claimant testified that the second opinion process yielded one nonconcurrence and another opinion stating that he should have further testing. The claimant said he had cardiac bypass surgery in 1998 and was found then to have chronic bronchitis (unrelated to this injury).

A report from treating doctor Dr. M dated April 27, 2000, commented that the claimant was doing well but for pain in his neck radiating into his right arm and that, due to pain medication, his headaches were down to a level of a five on a one to ten scale. She noted that he was awaiting notification regarding the outcome of the second spinal opinion process. This report does not comment at all on ability to work. Her May 26, 2000, letter stated that the claimant was depressed in part due to stress from the carrier and waiting for surgery. She noted that the claimant desired to return to school.

The claimant said that Dr. M had become ill and, as a result, referred him to other doctors. Dr. R, a chiropractor, examined the claimant initially on September 26, 2000. Nearly all of the report summarizes previous medical records. The only comment about

ability to work is that Dr. R has reviewed a May 26, 1999, functional capacity evaluation (FCE) and, based upon this and his examination findings, opines that the claimant does "not appear capable of work at this time." The examination recorded observation of pain and diminished motion in the cervical and thoracic spines and in the lumbar spine, although the claimant had a nonantalgic gait.

The FCE referred to by Dr. R recommended vocational retraining. The report noted that he could no longer return to work as a mechanic or perform medium to heavy work. Other than this, no conclusions were drawn as to the work level. It was noted that the claimant was very deconditioned, and was advised to refrain from repetitive and overhead work. He could sit for 15 minutes and stand for 20 minutes, after which a change in position would be required.

A surveillance videotape, lasting only slightly more than 30 seconds, is in evidence. It was taken June 5, 2000, and shows the claimant walking in an apparently normal fashion to his truck, which he enters, backs up, and drives away. The claimant assessed his own functioning ability as no more than four hours a day every day (with reference to his ability to work on his home computer or perform activities around the house).

Since January 31, 1999, the Texas Workers' Compensation Commission has required, through Rule 130.102(d)(3) and renumbered (d)(4), that proof of a complete inability to work should be proven not through inferences from an aggregate of medical records or lay testimony, but by:

> a narrative report from a doctor which *specifically explains how the injury causes a total inability to work*, and no other records show that the injured employee is able to return to work (emphasis added)[.]

The hearing officer in this case notes that Dr. M's records, "in their totality," show that she remained of the opinion that the claimant had no ability to work. The hearing officer further noted that these records show chronic and severe symptoms as well as taking medication. However, there is no report in evidence that constitutes a narrative report required by the rule.

Because of the clear rule on the matter, we cannot agree that a hearing officer can simply infer an inability to work from records detailing chronic physical sequelae from an injury, with no commentary on the ability to work as expressed in Rule 130.102(d)(4). Dr. R's single report stops short of meeting the requirement of a narrative described in that rule. The fact that a carrier may have paid previous quarters of SIBs without protest does not guarantee continued payment of SIBs.

We therefore reverse the hearing officer's decision and render a new decision that the claimant is not entitled to SIBs for the seventh quarter.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge